BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TOMMY S. NICKERSON Claimant	)	
VS.	)	Docket No. 1,010,070
SHERWIN WILLIAMS AEROSPACE CO. Self-Insured Respondent	)	

ORDER

Claimant requested review of the December 15, 2004 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on May 10, 2005.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Larry Shoaf of Wichita, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 1.5 percent whole person functional impairment and determined claimant's average gross weekly wage was $555.09.

Claimant requests review of the nature and extent of disability. Claimant argues he is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating) based on a 64 percent wage loss and a 50 percent task loss. Claimant further argues his functional impairment should be increased to 3 percent.

Respondent argues that any compensation for claimant's injury should be disallowed pursuant to K.S.A. 44-501(d)(1) because the injury resulted from claimant's willful failure to use a respirator as required in his job.

Respondent next argues that claimant is not entitled to a work disability because he returned to his former job without accommodation and was laid off for reasons unrelated to his injury at work. Absent the layoff respondent argues claimant would still be capable

of performing his former job. Respondent further argues claimant failed to make a good faith effort to find appropriate employment and has the ability to work as a journeyman electrician making a comparable wage. Therefore, a comparable wage should be imputed and he should be limited to his functional impairment. Finally, respondent argues claimant's average gross weekly wage should be reduced to $458 because claimant failed to meet his burden of proof to establish the value of his fringe benefits, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant worked in paint batch production and his job consisted of taking a base white paint and adding toners to make custom ordered colors for painting aircraft. In March 2003, claimant began to experience headaches and a stinging sensation when breathing, especially working with ethyl ketone. He then developed a nosebleed at work and was sent for medical treatment. When released to work he was required to wear a respirator at all times. On March 28, 2003, claimant was laid off as part of a plant wide reduction in force.

Initially, the respondent argues that any compensation for claimant's injury should be disallowed pursuant to K.S.A. 44-501(d)(1) because the injury resulted from claimant's failure to use a respirator as required in his job.

As previously noted, the claimant worked in paint batch production and described his job as consisting of taking base white paint and mixing it with toners to arrive at specialized custom colors for aircraft. Claimant argued that he understood claimant's policy to only require that he use a respirator when painting. Respondent argues that claimant was required to wear a respirator while performing many of his work activities and he repeatedly failed to comply with that requirement.

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The claimant argued he was not required to wear a respirator at all times while he performed his work activities and that contention is not seriously disputed. But the evidence further establishes that use of a respirator was required while performing certain activities. Nonetheless, the Board finds that although there was a requirement claimant wear a respirator while performing certain specified activities such as when cleaning pots, cleaning drums, spray painting and working with thinner, such requirement was not strictly enforced.

Although his supervisor, Mr. Guillero Martinez, testified claimant failed to wear his respirator on numerous occasions, claimant was apparently only verbally admonished on two occasions in the months before the specific incident when he developed the nosebleed.[1] As previously noted, the administrative regulation promulgated to implement the requirements K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation.

In this case the enforcement mechanism for the requirement to wear the respirator apparently consisted of the claimant's supervisor requesting claimant wear the device when he happened to observe claimant working without it. This allegedly occurred on numerous occasions but as previously noted, claimant's supervisor noted just two occasions he had memorialized where claimant received a verbal suggestion to wear his respirator. The respondent then points to the letter signed by claimant on March 17, 2003, as an indication of progressive discipline and rigid enforcement of the policy that the device be worn. But that letter merely identified that when claimant was released by the doctor to return to work he would receive additional training on the use of respirators and would wear the respirator while cleaning mix tanks.

Initially, the actions of the supervisor in merely requesting claimant wear the respirator cannot be said to be rigid enforcement of the safety rule, especially when claimant allegedly did not comply with the supervisor's request. By adopting such a course of action the respondent, as a practical matter, acquiesced in claimant's failure to wear the respirator, rather than enforcing the requirement.

[1] Martinez Depo., Ex. 5.

Rigid enforcement of the safety requirement would have been evidenced by progressive discipline including suspension from work for failure to wear the device. Further violations would have resulted in more severe punishment up to and including termination. The reason for safety rules, guards and other protective devices is to prevent workplace injury. The method of enforcement, or lack thereof, adopted by respondent does not prevent workplace injury and such inaction does not equate to rigid enforcement of the safety policy. The Board concludes that, under the facts of this case, respondent's safety policy was not rigidly enforced and cannot be utilized as a defense to the claim.

Claimant saw Dr. Pedro A. Murati on December 16, 2003, with complaints of chemical exposure and nosebleeds. Dr. Murati diagnosed claimant with epistaxis and chemical exposure.[2] He concluded that this was work-related and advised claimant to work as tolerated and to have no contact with chemical fumes nor aromatic compounds. He assigned a 3 percent whole person impairment.[3] He also ordered lab work to check claimant's liver function. Dr. Murati did indicate claimant would be able to perform all of his work tasks with the exception of the exposure to chemicals.[4] Dr. Murati further noted he saw no reason why claimant could not work if he wore a respirator that would prevent any chemical fumes from reaching his nose.

Claimant saw Dr. Philip R. Mills on August 11, 2004. Claimant was complaining of mucous membrane scabbing on the right nares and nasal cavity, that would sting when it comes loose. These scabs are the result of the treatment claimant received for the nose bleeds he was having from inhaling chemical fumes in the course of his employment.

It was Dr. Mills' opinion that claimant had remote epistaxis, now resolved and that with a reasonable degree of medical certainty there is a connection between claimant's current complaints and the reported fume exposure.[5] He found claimant had reached maximum medical improvement and based on the AMA *Guides*[6], claimant had no impairment. Claimant was directed to avoid breathing fumes and when working around chemical fumes he was advised to wear a respirator. The doctor also opined that claimant can perform any job that does not involves working around fumes.

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[2] Murati Depo., Ex. 2 at 7.

[3] *Id*. at 7.

[4] *Id*. at 20-21.

[5] Mills Depo., Ex. 2 at 4.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The ALJ noted that both medical experts agreed claimant's work activities caused his medical condition and he determined there was no persuasive reason not to accord equal weight to the opinions of both regarding impairment. Accordingly, the ALJ awarded claimant a 1.5 percent functional impairment to the whole person. The Board agrees and affirms.

The claimant next argues he is entitled to a work disability (permanent partial general disability greater than the whole person functional impairment rating) and should not be limited to his functional impairment. Conversely, respondent argues claimant returned to his job without accommodation and because he was terminated in a plant wide reduction he is not entitled to a work disability.

The evidence established that before the episode where claimant developed the nosebleed he was only required to wear a respirator while performing some but not all of his job duties. After he received treatment and was returned to work he was required to wear the respirator at all times. Accommodated work by definition differs in some respect from an employee's previous work.[7] Although claimant returned to the same job for respondent he performed before his injury, he was required to perform that job in a different way, i.e. , he was required to wear a respirator at all times. This clearly was a modification in the manner claimant performed his work and, thus, constituted an accommodation.

By placing an injured worker in an accommodated job the employer artificially avoids compensating the employee for a work disability by allowing the employee to perform work for a comparable wage. But if the accommodated work ends the employee may be exposed to the open labor market where a work disability may exist. In such instances, after the accommodated work ends, a work disability may be established.[8] Furthermore, under the current definition of work disability, the work tasks to be considered are for the entire 15 year period preceding the injury. Accordingly, unless the worker has performed the same job for 15 years, there can be a loss of job tasks, and thus a work disability, even where the worker returned to the same unaccommodated job.[9]

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[7] *Parsons v. Seaboard Farms, Inc.*, 27 Kan App. 2d 843, 847, 9 P.3d 591 (2000).

[8] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d. 837, 936 P.2d 294 (1997).

[9] See K.S.A. 44-510e(a).

Unemployment or job change due to economic change, such as a layoff, can result in a work disability.[10] In *Lee*[11], it was stated:

> It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

Because claimant returned to an accommodated job and then within a few weeks was laid off due to an economic reduction in force, he is entitled to a work disability analysis.

It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[12] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[13]

The claimant obtained part-time employment as an alcohol and drug abuse counselor and was attending classes to become a licensed counselor. It was further undisputed that claimant was a journeyman electrician.

In the determination of the appropriate wage to impute, the Board notes the claimant is a journeyman electrician and neither doctor offered restrictions that would prevent a return to that occupation. But claimant simply sought a change of occupation and is attempting to become a licensed alcohol and drug abuse counselor.

The Board finds claimant did not exhibit a good faith effort to find appropriate employment. Claimant has chosen to attempt to change his career and while that effort is not necessarily an attempt to manipulate the workers compensation system, nonetheless, his good faith effort must be analyzed based upon his attempt to find appropriate employment. In this case, the claimant's capacity to earn wages must necessarily include his demonstrated capacity to work as a journeyman electrician.

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[10] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[11] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

[12] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[13] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Respondent's vocational expert, Dan Zumalt, opined the claimant could make a wage comparable to what he was earning for respondent if he were to pursue employment in his prior vocation as a journeyman electrician.[14] The claimant testified he averaged $26,000 annually working as a journeyman electrician.

The Board concludes the claimant has the ability to earn a wage as a journeyman electrician equal to 90 percent or more than his pre-injury average gross weekly wage. Consequently, his permanent partial general disability award is based upon his permanent functional impairment.[15]

Finally, the respondent argues claimant failed to establish the value of his fringe benefits and his average gross weekly wage should be reduced to $472.56. It is undisputed that claimant's base average gross weekly wage was $458. And the claimant's overtime would provide an additional $15.69 per week.[16] And, claimant's uncontradicted testimony was that his fringe benefits had a value of $81.40 per week.[17] This results in an average gross weekly wage of $555.09. Furthermore, respondent has a responsibility to provide a wage statement that is accurate and complete. If respondent disputes the accuracy of the claimant's testimony regarding the value of fringe benefits, then respondent must present its own figure and must come forward with evidence, including payroll records, to substantiate its position.[18] In this case respondent did neither. The ALJ's finding is affirmed.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge John D. Clark dated December 15, 2005, is affirmed but for different reasons.

The claimant is entitled to 33 weeks of temporary total disability compensation at the rate of $370.08 per week or $12,212.64 followed by 5.96 weeks of permanent partial disability compensation at the rate of $370.08 per week or $2,205.68 for a 1.5 percent functional disability, making a total award of $14,418.32, which is ordered paid in one lump sum less amounts previously paid.

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[14] Zumalt Depo., at 34.

[15] See K.S.A. 44-510e(a).

[16] R.H. Trans., Cl. Ex. 4.

[17] P.H. Trans., at 7.

[18] K.A.R. 51-3-8(c).

IT IS SO ORDERED.

Dated this _____ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Larry Shoaf, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director